

JUN 7 1976

MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1975

No. 75-1318

CECLE G. PEARSON,

Appellant

versus

W. P. DODD; ERNESTINE DODD,
his wife; and COLUMBIA GAS TRANSMISSION
CORPORATION,

Appellees.

ON APPEAL FROM A DECISION OF THE
SUPREME COURT OF APPEALS OF WEST VIRGINIA

Supplemental Response by Appellee to Supplemental
Brief by Appellant, concerning the requirements
of Rule 15-1-(d).

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Corporation

June 4, 1976

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SUPPLEMENTAL RESPONSE

In response to a request to Appellant for further information relating to Due Process made by the Clerk of the Court on May 21, 1976, under Rule 15-1-(d), the Appellant has filed and served a document denominated "Supplemental Brief . . . relating to Due Process". In reply thereto, this Appellee submits the following:

In the Supplemental Brief, Appellant has gone far beyond the request directed to her under Rule 15-1-(d). Extraneous to the requirements of that Rule, and beyond the Clerk's request for compliance therewith, the Appellant cites Paschall v. Christie-Stewart, Inc., 414 U.S. 100 (1973), and argues on the basis of that case, that there is no justification for sending this case back to the lower court for further deliberation.

This Appellee concurs in the assertion that there is no justification for remanding this case to the Supreme Court of Appeals of West Virginia for any further proceedings.. However, the authority of Paschall, and the authority therein cited, have an entirely different effect than that contended for by Appellant. A comparison of Paschall with the present appeal by Pearson is both necessary and determinative. The rule of Paschall requires the dismissal of this appeal.

In Paschall, the former owner of real estate brought a suit to quiet title as against the purchaser at a tax sale. The trial of the case involved issues of due process and a statute of limitations, and the trial court upheld the Oklahoma statutes on both issues. On the issue of due process, the Oklahoma Court of Appeals reversed the trial court. However, the Supreme Court of Oklahoma overruled the Court of Appeals on the issue of due process. Upon appeal to the United States Supreme Court, this Court, observing that it had probable jurisdiction on the authority of Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), remanded Paschall to the Supreme Court of Oklahoma to determine whether, under state law, the statute of limitations independently barred Appellant's attack on the tax title. If that should prove to be the case, this Court observed, any decision by this Court would be advisory and beyond its jurisdiction, citing Murdock v. City of Memphis, 20 Wall. 590 (1875).

What, then, is the decisive meaning of Paschall on the present appeal? In Pearson, now before the Court, the former real estate owner (Appellant) brought a suit to quiet title as against the purchaser (Appellee Dodd) at a tax sale. The trial court upheld the West Virginia statutes in all respects, including the issue of due process which had been raised early-on. Upon appeal from the trial court, the Supreme Court of Appeals of West Virginia upheld the lower court on the issue

of due process and, further, held that the attack on the tax sale was barred by the statutory entitlement (i.e., a statute of limitations), pursuant to the provisions of Code, 11A-3-8. This is conceded by the Appellant in the Supplemental Brief (at page 8).

The Appellant asserts that this Court has probable jurisdiction on the authority of Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). That issue has been fully discussed in Appellant's Jurisdictional Statement and in this Appellee's Motion to Dismiss or Affirm.

Following the Paschall case, this Appellee submits that there can be no remand to the Supreme Court of Appeals of West Virginia: under the law of the State of West Virginia, it has already been determined that the statutory entitlement (i.e., a statute of limitations) independently bars Appellant's claim. As this Court observed in Paschall, any decision by this Court would be advisory only and beyond its jurisdiction, citing Murdock v. City of Memphis, 20 Wall. 590 (1875).

For more than 100 years, the applicable rule of law has been, and remains, as stated in Murdock:

"5. If it [this Court] finds that it [the constitutional question] was rightly decided, the judgment must be affirmed."

"6. If it [the constitutional issue] was erroneously decided against plaintiff in error, then this court must further inquire, whether there is any other matter or issue adjudged by the State Court,

which is sufficiently broad to maintain the judgment of that court, notwithstanding the error in deciding the issue raised by the federal question. If this is found to be the case, the judgment must be affirmed without inquiring into the soundness of the decision on such other matter or issue." (22 L.Ed. 429, 444).

The Supreme Court of Appeals of West Virginia held in its decision in the Pearson case, based on previous decisions of local law in West Virginia:

"It is our belief, and we so hold, that [under Code, 11A-3-8, *supra*] a former owner possesses a statutory entitlement, i.e. a right to redeem at any time within eighteen months of the date of the State purchase. If, however, redemption does not occur during this period, then the statutory entitlement no longer exists because absolute title has vested in the State. Only at this latter point in time is the State permitted by W.Va. Const., Art. XIII, §§ 3 and 4 to institute a suit to sell lands for the school fund. *State v. Gray*, 132 W.Va. 472, 52 S.E.2d 759 (1949); *State v. Blevins*, 131 W. Va. 350, 48 S.E.2d 174 (1948); *State v. Farmers Coal Co.*, 130 W.Va. 1, 43 S.E.2d 625 (1947)". (App. at 20A).

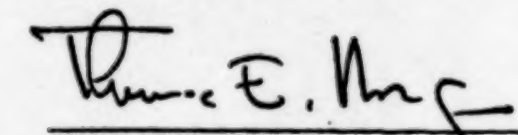
Irrespective of whether the issue of due process was correctly decided (Appellee's position is that it was correctly decided), this Appellee submits that the judgment of the Supreme Court of Appeals of West Virginia is sufficiently broad in its ruling that Code, § 11A-3-8 independently bars Appellant's claim and that the judgment must be now affirmed without further inquiry into the due process issue.

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CONCLUSION

With this Supplemental Response, this Appellee, Columbia Gas Transmission Corporation, respectfully submits that the decision of the Supreme Court of Appeals of West Virginia is clearly correct; that this appeal does not present a substantial federal question; that the judgment below rests on an adequate non-federal basis; and, that this Court should dismiss this appeal and affirm the decision below.

Respectfully submitted,



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June 4, 1976

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AFFIDAVIT OF SERVICE OF
SUPPLEMENTAL RESPONSE BY APPELLEE
TO SUPPLEMENTAL BRIEF BY APPELLANT

STATE OF WEST VIRGINIA,
COUNTY OF KANAWHA, TO-WIT:

I, THOMAS E. MORGAN, attorney for Columbia Gas Transmission Corporation, Appellee herein, depose and say that on the 4th day of June, 1976, I served three copies of the foregoing Supplemental Response By Appellee to Supplemental Brief by Appellant upon Cecle G. Pearson, Appellant herein, by depositing the same in a United States post office or mail box, with first class postage prepaid, addressed to Philip G. Terrie, counsel of record for said Cecle G. Pearson, at 1009 Security Building, Charleston, West Virginia 25301; and, further that I served three copies of the foregoing Supplemental Response by Appellee to Supplemental Brief by Appellant upon W. P. Dodd and Ernestine Dodd, his wife, Appellees herein, by depositing the same in a United States post office or mail box, with first class postage prepaid, addressed to William E. Hamb, counsel of record for said W. P. Dodd and Ernestine Dodd, at his office at 950 Kanawha Boulevard, East, Charleston, West Virginia 25301.

Thomas E. Morgan

Thomas E. Morgan

Subscribed and sworn to before me by Thomas E. Morgan,
at Charleston, West Virginia, this 4th day of June, 1976.

My commission expires May 18, 1981.

Sue Risk

Notary Public in and for
Kanawha County, West Virginia

(Commissioned as Sue Walker)